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No. 85-908

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and
BENJAMIN SEYMOUR,

Petitioners,

vs.

FRANK HAYGOOD,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT PROPERLY APPLIED LOGAN V. ZIMMERMAN BRUSH COMPANY TO A CASE INVOLVING INTERFERENCE WITH A LIBERTY INTEREST.

2. WHETHER PETITIONERS WERE ENTITLED TO A QUALIFIED IMMUNITY AS A MATTER OF LAW.

3. WHETHER AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE.

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IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE NINTH CIRCUIT
COURT OF APPEALS

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent FRANK HAYGOOD respectfully prays that this court not issue a writ of certiorari to review the judgment.

* * * * *

OPINIONS BELOW

In addition to the lower court's opinions attached to petitioners' petition and supplemental appendix, respondent attaches to this opposition to certiorari the trial court's pre-trial memorandum of January 5, 1978. A copy of the relevant portions of this memorandum is attached hereto as Appendix A.

JURISDICTION

The brief for opposing the petition for writ of certiorari is filed within the time period extended by this court in its letter of December 9, 1985 in accordance with Rule 22 and Rule 29(1) of the Rules of the Supreme Court of the United States. This court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

The Civil Rights Act of 1871 (42 U.S.C. Section 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof tc the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The Civil Rights Act of 1964 (42 U.S.C. Section 1988) provides:

> In any action . . . of Section 1983 of this title, the court, in its discretion may allow the prevailing party. . . a reasonable attorney's fee as part of the costs.

ATTORNEY'S FEES AND COSTS

Respondent seeks costs and attorney's fees for this action under 42 U.S.C. Section 1988 and Rule 50 of the United States Supreme Court.

STATEMENT OF THE CASE

Respondent agrees with petitioners' statement of the case.

STATEMENT OF FACTS

Respondent, FRANK HAYGOOD, former prisoner of the State of California, originally filed a complaint under 42 U.S.C.

Section 1983, 1985(3), 1986, for damages and under 28 U.S.C. Sections 2201 and 2202 for declaratory relief. Respondent also appended a claim for damages for false imprisonment, a tort under state law (CD 1). The original defendants were Attorney General of the State of California, the Director of Corrections of California, various members of the California Adult Authority, the California Adult Authority, the Administrative Officer of the Adult Authority, the Warden of Folsom Prison, the Records Officer of Folsom Prison, a Correctional Counselor at Folsom Prison, and a Records Officer for the Department of Corrections.

Respondent was, in 1946, convicted of escape and sentenced to State prison for an indeterminate term not to exceed ten years. That term, designated his "O" term by the Department of Corrections, was completely discharged on June 29, 1953.

In 1949, respondent was convicted of five counts of forgery, and was sentenced to concurrent terms of imprisonment of from one to fourteen years on each count. Those terms were designated respondent's "A" terms by the Department of Corrections, and was concurrent to his "O" term. Commencement of the "A" term began on April 1, 1949. If this term of imprisonment had not been interrupted, respondent would have served the maximum number of years on this term on April 2, 1963.

However, in 1956, respondent was convicted of carrying a concealed weapon in violation of Penal Code Section 12021, and was sentenced to state prison for an indeterminate term not to exceed five years. This term was concurrent to the previously imposed terms and commenced on April 25, 1956. This term was designated respondent's "B" term by the Department of Corrections.

If this term had not been interrupted, re
spondent would have served the maximum num
ber of years on this term on April 26, 196

However, on or about December 21
1958, respondent escaped from custody whil
serving his "A" and "B" terms. While a
large, he committed a robbery, and was con
victed of this offense on January 5, 195
He was sentenced on the robbery convictio
to an indeterminate life term, designate
his "C" term of the Department of Correc
tions. Service of the "C" term began o
January 8, 1959. This term was concurren
to the "A" and "B" terms.

Subsequently, on or about Apri
14, 1959, respondent entered a guilty ple
to a violation of the then-existing provi
sions of Penal Code Section 4531 (escape)
and was sentenced to an indeterminate lif
sentence with a one-year minimum, said ter
"to run at the time he would otherwise hav

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been discharged". This term was designated respondent's "D" term by the Department of Corrections.

Upon his return to prison in 1959, respondent's "D" term (escape) was determined to be consecutive not only to his "A" and "B" terms, but also to his "C" term.

In conjunction with the granting of parole, the Adult Authority, on October 8, 1970, fixed respondent's "C" term (robbery) at ten years and his "D" term (escape) at five-and-one-half years. Respondent was given a final discharge date on all his terms on July 8, 1974. Because the October 8th action fixed the "C" term at less than the time already served, an "administrative discharge" was recorded, effective retroactively to January 8, 1969. Although respondent had completed the maximum possible sentence on his "A" and "B" terms as of 1963 and 1961 respectively, the Adult Authority

continued to refer to those terms in accordance with the Department of Corrections' "Continuous Term Policy", instead of applying Penal Code Section 4531 (escape).

Subsequently, on respondent's return to prison in 1973, the Adult Authority revoked respondent's parole and refixed his "A", "B", "C" and "D" terms at their maximum. He was transferred to Folsom Prison in December 1973.

Soon after his arrival at Folsom, MR. HAYGOOD received a slip of paper from the Adult Authority notifying him of his legal status. Respondent said he became upset with this form because he thought it indicated that he was still serving time on his "A" and "B" terms, as well as on his "C" term. Respondent also thought that the form indicated that he had not yet been credited with serving any time on his "D" term. (RT Vol. II, p. 391). Respondent's legal ad-

visor PHILIP GASKILL, after looking at the form, thought that MR. HAYGOOD was being illegally detained (RT Vol. II, p. 289).

Defendant WIPF was a Correctional Counselor I at Folsom State Prison. WIPF met with respondent on at least five occasions and possibly more to discuss MR. HAYGOOD'S concern about his sentences. Respondent sent three letters to WIPF concerning his terms of imprisonment. MR. HAYGOOD told WIPF that he felt he was being illegally detained (RT Vol. II, p. 447). WIPF also discussed respondent's concerns with defendant/petitioner, CRANKE. Defendant/petitioner, CRANKE, was a Records Officer II at Folsom State Prison. The duties of a records officer are described in an exhibit which was introduced into evidence and read to the jury at trial.

These duties include reviewing, defining, and recording terms and sentences

shown in commitments; interpreting and applying Adult Authority actions as they relate to custody and release; performing computations or supervising the making of computations necessary to determine the legal date of parole and discharge for inmates; serving as an expert witness in legal proceedings.

On or about March 4, 1974, respondent sent a letter to MR. CRANKE regarding his sentences. MR. CRANKE acknowledged receiving the letter. This letter complains that the Adult Author-ity placed him back on all of his terms ("A", "B", "C" and "D") at the maximum and allowed him no credit for time served on the one to life sentence ("D" term). He asked, "How can this be possible???" He also complains that the answers he received from MR. WIFF were not satisfactory to him. (RT Vol. II, pp. 295-296).

MR. CRANKE read the letter and then reviewed respondent's central file which included the legal status form, the cumulative case summary, the abstracts of judgment, and copies of the sentencing proceedings. MR. CRANKE then determined that respondent's concerns about his sentence could best be answered by referring him to the continuous term policy which was set forth in two specific Attorney General's opinions (RT Vol. III, pp. 588-590, 606; RT Vol. II, p. 274). He then sent MR. HAYGOOD a short reply to this effect.

Defendant, JOSEPH A. SPANGLER, was the Administrative Officer of the California Adult Authority.

On March 8, 1974, respondent sent a letter to defendant SPANGLER regarding his sentences MR. SPANGLER did not recall receiving this letter, did not personally investigate respondent's allegations, and

did not receive any written or oral reports once he had directed MR. SEYMOUR to respond to respondent's letter (RT Vol. II, pp. 274-275).

In this letter, respondent, after explaining his sentences and what he perceived to be in error, stated:

> "Under the statutory provisions of the California Penal Code Sections 2940, 2941, 3021, 3023, and 4531 (repealed by Stats. 1963), I am being illegally detained by the Department Corrections in violation to said sections as well as the California and United States Constitutions." (emphasis added). (RT Vol. II, pp. 300-304).

Defendant/petitioner, BENJAMIN F. SEYMOUR, was a Records Officer III for the California Department of Corrections. The duties of a Records Officer III are described in an exhibit which was introduced into evidence at trial. In addition to those duties contained in the job description for a Records Officer III, a Records Officer

III's duties include: determining legal status for parole and discharge dates for inmates; analyzing inmate records and recognizes discrepancies and irregularities (RT Vol. II, pp. 319-320).

MR. SEYMOUR received respondent's letter dated March 8, 1974, which had been addressed to MR. SPANGLER. He reviewed respondent's central file, including the cumulative case summary, legal status form, Attorney General opinions, and spoke with MR. CRANKE to confirm MR. HAYGOOD'S legal status (RT Vol. III, pp. 612-614, 623-624; RT Vol. II, p. 275).

On April 1, 1974, MR. SEYMOUR sent a short letter to MR. HAYGOOD again merely referring him to Attorney General's opinions that did not apply to respondent's complaints. (RT Vol. II, p. 308).

Respondent was not satisfied with either MR. CRANKE'S or MR. SEYMOUR'S re-

sponse and on July 25, 1974, he filed a proper petition for a writ of habeas corpus in the California Supreme Court (plaintiff's Exhibit 15). The issue originally presented was whether the Department of Corrections lost jurisdiction over respondent when he was "presently confined and not receiving any credit for time being served". (RT Vol. II, pp. 309-310).

In the case of In re Haygood, 14 Cal.3d 801 (1975), the California Supreme Court determined that the refixing of respondent's terms was erroneous, and accepted respondent's contention that the "D" term was consecutive only to the "A" and "B" terms and was concurrent with the "C" term. Thus, the "C" term expired on January 8, 1969, as determined by the Adult Authority action of October 8, 1970, fixing it at ten years. Based on the action of the same date fixing the "D" term at five-and-one-half

years, the "D" term expired in late 1968, since it commenced from the date respondent would otherwise have been discharged from the "A" and "B" terms, since these were the terms he was serving at the time of his escape. In essence, therefore, the Supreme Court reasoned that the Adult Authority's actions on October 8, 1970, effectively terminated all of respondent's term, and he was entitled to be released by writ of habeas corpus (RT Vol. II, p. 361).

REASONS FOR DENYING THE PETITION

I

PETITIONERS ACTED PURSUANT TO AN ESTABLISHED STATE POLICY

Petitioners argue that the application of the continuous term policy to HAYGOOD'S sentences did not violate his due process rights. They support this contention by citing an unchallenged ruling of the

District Court. A close reading of this pre-trial ruling reveals their argument is without foundation.

Judge McBride stated in his memorandum:

> "For purposes of the motion to dismiss only, defendant Procunier, states that, even if it can be assumed that he adopted a policy whereby all consecutive sentences were to be considered as one continuous term, this policy caused no harm to the plaintiff and, consequently, the complaint fails to state a claim on which relief can be granted." (CD 19, Order 1/5/78), page 6). (emphasis added). (See attached Appendix A).

This ruling was for a single defendant who was dismissed from this action. That ruling was not based on any evidence before the court at that time. Some three years later at the trial of this matter, substantial evidence was presented that the continuous term policy (an established state procedure) was applied to respondent's terms

of imprisonment.

Petitioners HAROLD CRANKE and BENJAMIN SEYMOUR and their witness, JEAN BRISCOE, all records officers, admitted they felt they had only to determine respondent had a consecutive sentence. Once so determined, they simply applied the continuous term policy without further investigation. (Testimony of JEAN BRISCOE, RT Vol. III, p. 528, lines 16-18; p. 547, lines 1-3; p. 565, lines 4-8, See attached Appendix B-1; Testimony of HAROLD C. CRANKE, RT Vol. III, p. 592, lines 7-13; p. 601, lines 12-25, See attached Appendix B-2; Testimony of BENJAMIN SEYMOUR, RT Vol. III, p. 615 lines 2-6; p. 630, lines 6-8, See attached Appendix B-3).

In fact, JEAN BRISCOE testified that after the California Supreme Court issued the decision in In re Haygood, 14 Cal.3d 801 (1975), every state inmates' records were reviewed to determine whether any

escape sentence was being misapplied. (RT. Vol. III, p. 546, lines 1-6, see attached Appendix B-1).

Petitioners, in fact, requested that a continuous term policy instruction be given to the jury. Judge KARLTON refused to instruct the jury that this policy did not injure plaintiff. (RT. Vol. III, pp. 581 and 582, see attached Appendix B-4). In fact, the jury was charged that respondent "was subjected" to this policy in that his "D" term ran consecutive to all three terms instead of only the "A" and "B" terms. (RT Vol. III, p. 698, lines 5-14. See attached Appendix B-5).

Based on the testimony of petitioners and their witness, the trial court overruled the January 5, 1978 pre-trial order and charged the jury that petitioners' application of the continuous term policy injured respondent.

Based on the application of an established state policy to respondent's terms of imprisonment, the Ninth Circuit en banc court's holding that Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) applies rather than Parratt v. Taylor, 451 U.S. 527 (1981) was proper.

II

PARRATT V. TAYLOR DOES NOT APPLY TO NEGLIGENT DEPRIVATIONS OF RESPONDENT'S LIBERTY INTERESTS

A. Parratt v Taylor Does Not Apply To Liberty Interests

Should this court decide that Logan v. Zimmerman Brush Co., (supra) does not apply to the instant case, petitioners have asked this court to apply Parratt v. Taylor.

In Parratt v. Taylor, this Court held that the existence of a state tort remedy for the negligent deprivation of a prisoner's property satisfies the due process clause of the consitution. Circuit

courts are divided on the question of wheth-
er Parratt applies to deprivations of
liberty interests. Compare Brewer v. Black-
well, 695 F.2d 387, 394-95 (5th Cir. 1982)
(Parratt does not apply to deprivations of
liberty) to Ellis v. Hamilton, 669 F.2d 510,
515 (7th Cir.) cert. denied, 103 S. Ct. 488
(1982). The issue is unsettled in the Ninth
Circuit. Compare Rutledge v. Arizona Board
of Regents, 660 F.2d 1345 (9th Cir. 1981),
aff'd on other grounds sub nom. Kush v. Rut-
ledge, 103 S. Ct. 1483 (1983) with Wakineko-
ma v. Olim, 664 F.2d 708 (9th Cir. 1981),
(Parratt does not apply).

Rutledge however is different than
the instant case in that the plaintiff in
Rutledge chose redress in the state courts
where respondent in the instant case chose
redress in the federal court. The court in
Rutledge at page 1352 states;

> "In the instant case, since appellant has sought redress in the Arizona State Courts, and in the absence of suggestion that the post-deprivation procedures under state law are deficient, we must conclude that the alleged deprivation was not without due process of law." (emphasis added).

The plaintiff in Rutledge acknowledged that the state remedy was sufficient in that he sought redress in the state courts.

In the present action, respondent alleges, as was held by Judge Karlton in his decision, that the tort action provided by the state does not satisfy due process when what was required was respondent's timely release. Parratt requires a hearing before the claimant is finally deprived of his interest. His due process right is the right to be released from prison when his lawfully fixed term of imprisonment expired. McNeil v. Patuscent Institutions Director, 407 U.S. 245 (1972); Johnson v. Mueller, 415

F.2d 354 (4th Cir. 1969); Speaks v. McGregor, 355 F. Supp. 1129 (W.D. Va. 1973).

The Ninth Circuit refused to apply Parratt in Wakinekoma v. Olim, (supra), by pointing out that Justice Blackmun's concurrence, which Justic White endorsed, limited the case to property issues. It stated at 664 F.2d at 714 that cases "dealing with a liberty interest [are] of a wholly different nature" than those involving property. The Fifth Circuit in Brewer v. Blackwell, (supra), also refused to apply Parratt to liberty interests and relied on the narrow reading given Parratt by the Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982), as well as on the citation in Logan to Justice Blackmun's concurrence in Parratt 692 F.2d at 394-95; see 455 U.S. at 436. Although petitioners fail to acknowledge it, "property interests" are wholly different than "liberty interests".

B. The Distinction Between "Property" and "Liberty" is The Inability To Compensate For "Liberty" Violations Once They Occurred

Petitioners argue that there is no factual or legal basis for distinguishing between property and liberty issues with respect to the application of Parratt where negligent conduct is the basis of respondent's claim. There is no question that when a deprivation is caused by negligence there can be no pre-deprivation hearing because negligence is unforeseen. But the interest deprived is the distinction. There is a great deal of difference between a "property interest" and a "liberty interest". Justice White in his dissent in the case of Ingraham v. Wright, 430 U.S. 651, 695 (1977) correctly points out that tort actions available to correct violations of liberty are inadequate. These later court

actions occur "after the punishment has been finally imposed. The infliction of physical pain is final and irreparable, it cannot be undone in subsequent proceedings". Justice White then makes the similar argument made by Judge Karlton in his November 30, 1981 opinion when he argues that;

> "The majority's conclusion that a damages remedy for excessive corporal punishment affords adequate process rests on the novel theory that the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent. The logic of this theory would permit a State that punished speeding with a one-day jail sentence to make a driver serve his sentence first without a trial and then sue to recover damages for unlawful imprisonment. Similarly, the State could finally take away a prisoner's good-time credits for alleged disciplinary infractions and require him to bring a damage suit after he was eventually released."

Justice Stevens in his dissent in Ingraham made a special point of focusing on

those situations in which post-deprivation remedies would be "constitutionally sufficient" (430 U.S. at 701). He wrote;

> "When only an invasion of a property interest is involved, there is a greater likelihood that a damage award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a post-deprivation state remedy may be all the process that the fourteenth amendment requires."

See also Bonner v. Coughlin, 517 F.2d 1311, 1318-30 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978).

C. Respondent's Due Process Required That His Liberty Be Restored To Him At the Precise Moment Fixed By State Law

Petitioners argue that because California has a tort claims statute under which respondent could have sued, he is

foreclosed from bringing this section 1983 action in the federal courts. In other words, the only process due to respondent is an action under the California Torts Claim statute.

Judge Karlton disposes of this argument in his published November 30, 1981 opinion by making a distinction between the right guaranteed to the respondent by the due process clause, and the remedy which is available to him if that right is breached. (See pp. 10-11 of Exhibit C of petitioners' supplemental appendix). He states that the efficacy of a post-deprivation hearing to remedy the injury is pertinent, and is a factor in considering whether due process has been accorded; it is not the relevant factor in this present case. He further stated that we must look to the precise nature of the governmental function involved, as well as the private intrest

that has been affected by goverenmental action to determine what procedural due process may require under any given set of circumstances. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Morrisey v. Brewer, 408 U.S. 471, 481 (1972). He finds that respondent was entitled to have his liberty restored to him at the precise moment fixed by state law. In Parratt, the plaintiff's interest was solely to receive his property and a post-deprivation hearing would suffice since that process would restore the equivalent of property - money. Money is not the equivalent of liberty.

A hearing after respondent was released would not be enough in that Parratt requires a hearing before the claimant is finally deprived of his interest. 101 S. Ct. at 1908. "Once liberty is gone it can never be recovered. Money is compensation

for liberty denied; money is not liberty itself." The Tort action provided by the state does not satisfy due process when what was required was the timely release of respondent.

He further states that petitioners' argument suggests:

> ". . . that government officials are permitted under the Due Process Clause to incarcerate individuals for any reason at all as long as the state later pays those individuals for their lost time." p. 12.

That reduction ad absurdum illustrates that what is at issue here is the notice of the consitutional right guaranteed. The effect of these guarantees is to set a standard of conduct for government officials. It must be clear what standards are required, not just what the remedy is for the occasional breach.

Petitioners' argument is also inconsistent with applicable precedent in that

they are proposing that respondent must exhaust state remedies before bringing a Section 1983 action based on due process simpliciter. That proposal ignores two decades of case law, as well as the history of the statute itself. (See Monroe v. Pape, 365 U.S. 167, 183 (1961). See also Comment, Actionability of Negligence under Section 1983 and the Eighth Amendment. 127 U. Penn. L.R. 533, 554-555 (1978).

Petitioners argue that this case is simply an instance in which the proper authorities understood the California law of indeterminate sentences in a fashion subsequently determined to be incorrect by the Supreme Court of California on a six to one vote. This is simply not the case. Petitioners followed the normal procedure of the Adult Authority and applied the consecutive sentence policy to respondent's terms of imprisonment. Once they received respon-

dent's complaints, a duty arose whereby they were obligated to investigate respondent's individual terms of imprisonment and current California law. The California Supreme Court did not change the then applicable laws. In In re Haygood, (supra), they merely pointed out that the California Adult Authority's consecutive sentence policy was not properly applied to respondent's case. Petitioners admitted at trial that the only investigation that was made was whether respondent was serving consecutive sentences. The law was not determined to be incorrect, it was simply not applied properly to respondent. The process due to respondent was his immediate release, upon putting petitioners on notice. A jury has already determined that petitioners failed in their duty.

III

SINCE PETITIONERS WERE "DELIBERATELY INDIFFERENT" TO RESPONDENT'S NOTICE OF VIOLATIONS OF AN ESTABLISHED RIGHT, THEY ARE NOT ENTITLED TO A QUALIFIED IMMUNITY DEFENSE

On the motion for judgment notwithstanding the verdict, the trial judge held that there was sufficient evidence from which the jury could have found that petitioners intended to punish respondent by their actions. Haygood v. Younger, 527 F. Supp. at 819, 821-822. There was credible evidence from which the jury could have found that the petitioners, after being put on notice, simply refused to investigate a computational error. Haygood v. Younger, (supra at 823). Thus, as the en banc court found, there was adequate evidence from which the jury could have found liability under the appropriate standard of "deliberate indifference". Haygood v. Younger, 769 F.2d at 1355 (9th Cir. 1985). Petitioners

do not here challenge the court's ruling that respondent's unlawful incarceration constituted cruel and unusual punishment in violation of the Eighth Amendment. As the Ninth Circuit found in Albers v Whitley, 743 F.2d 1372 at 1377 (9th Cir. 1984), cert. granted, ___ U.S. ___, 105 S. Ct. 2700 (1985), a finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive. The petitioners did not need the benefit of the California Supreme Court's 1975 ruling as petitioners argue in their brief. Had petitioners not been deliberately indifferent and performed their duties to investigate respondent's allegations, they would have discovered that under the provisions of California Penal Code Section 4531 (since repealed), the computation of respondent's terms of imprisonment were erroneous.

As this court finds in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982); "Where an official could be expected to know that certain conduct would violate statutory or consitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action".

It is absurd to assert that any official may simply close their eyes and ears to the assertions of violations of established laws and constitutional rights and thus be shielded from liability.

IV

THE NINTH CIRCUIT DID NOT ERR IN SUSTAINING THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES

A. There Is No Requirement Under 42 U.S.C. Section 1988 That Attorney's Fees Must Be Proportionate To The Recovery In Order To Be Reasonable

Judge Karlton in his unpublished order of November 30, 1981 applied the 12 factors set forth in Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), Cert. denied sub non. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976) in awarding respondent attorney's fees. (see petitioners' supplemental appendix D).

As the Ninth Circuit has made clear, the star which must guide this court in exercising its discretion is the purpose underlying 42 U.S.C. Section 1988. ". . . Congress' purpose in authorizing fee awards was to encourage compliance with and enforcement of the civil rights laws. The Fees Award Act must be liberally construed to achieve these ends. 'In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies

available to achieve the goals of our civil rights laws.'" Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) (quoting S.Rep.No. 94-1011, 94th Congress, 2d Sess., 3 reprinted in [1976] U.S. Code Cong. & Ad. News 5910). The approach suggested by petitioners could effectively preclude former prisoners and other "unsympathetic plaintiffs" from litigating constitutional claims, for attorneys could not risk the necessary months and years of work on what could turn out to be an insignificant damages verdict. This result cannot be squared with the broad remedial purposes of the statute. The statute is not designed to reward attorneys for winning high verdicts; it is meant to encourage them to sue on meritorious consitutional claims.

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B. The Amount Of The Recovery Was Taken Into Account By The Trial Court In Determining The Award Of Attorney's Fees

Although the case of Hensley v. Eckerhart, 461 U.S. 424 (1983) had not been decided at the time of the trial courts order awarding attorney's fees, the rationale behind Hensley had been followed. Hensley requires that the lower court consider the amount of the attorney's fee award in light of the success achieved by the plaintiffs. The trial court in the instant case drastically reduced the lodestar figure by 65% as a result of the amount of damages obtained by respondent. (see petitioners' supplemental appendix D, p. 63).

C. Attorney's Fees (Under Section 1988) Should Be Granted To The Prevailing Attorney Without Regard To The Amount of Damages

The jury in the present case had

to consider awarding damages to respondent who had served over twenty years of imprisonment for various crimes. The damages they were awarding were for only the last seventeen months of his incarceration. These damages were being assessed against two retired records officers with a lifetime history of service to the State of California.

By reducing the attorney's fee award proportionately to the result obtained, former prisoners and other "unsympathetic plaintiffs" would be effectively foreclosed from litigating consitutional claims. Private attorneys could not risk the months and years on a case that may turn out to be of low monetary damages. The constitutional violations involved would be left unchallenged.

In the present case, the trial court determined that ". . . the issues pre-

sented were sufficiently fresh and important." (petitioners' supplemental appendix B, p. 42). ". . . he proved that he had been deprived of his constitutional rights and that the defendants had caused that deprivation. . ." (p. 47). ". . . this case involved novel and extremely complex issues regarding the nature of the statute under which it was brought (42. U.S.C. Section 1983), and the state of mind requirements (if any) implied into the plaintiff's cause of action by the underlying consitutional claims. In addition, the case involved complicated issues regarding the immunities from suit claimed by various defendants. In several respects, this case presented issues that are at the frontier of civil rights litigations." (p. 54). "Similarly, the claim that 'plaintiff's action conferred no great benefit on society nor did it establish a precedent which would affect large

numbers of people misses the mark. To begin with, we have the testimony offered by the defendants' witness to the effect that no other records officers would have done more than defendants did to investigate the plaintiff's meritorious claim that he was entitled to be released. One hopes that this lawsuit will have some impact on the standard of conduct of officials who are charged with releasing prisoners whose sentences have run. Furthermore, the issues raised in this litigation were sufficiently fresh and important that this court thinks it worthwhile to publish its conclusions. Whether that precedent will "affect large numbers of people" remains to be seen". (p. 42).

These issues were novel enough and complex enough for the Ninth Circuit to hear them "en banc". The issues presented and resolved in this case are a great benefit to

the evolution of civil rights law.

This case is more like Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891, 104. S. Ct. ___ (1984) than City of Riverside v. Rivera, 763 F.2d 1580, cert. granted No. 85-224 October 1985 in that attorney's fees were granted to compensate for the complexity and novelty of the issues and the great benefits achieved.

The intent of the legislators in enacting 42 U.S.C. 1988 was to encourage "private attorney generals" to pursue compliance with the Civil Rights Act. "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorney's compensated by a paying client, for all time reasonably expended on the matter". (emphasis added) U.S. Code Cong. & Ad News 5913 (supra).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

JACK JACOBSON
Attorney for Respondent

JJ/ih

APPENDIX A

An examination of plaintiff's complaint reveals that other constitutional rights are, in fact, identified; plaintiff asserts violation of his right against cruel and unusual punishment and his right not to be placed twice in jeopardy, among others. Even if plaintiff did not specifically identify particular constitutional rights that have allegedly been violated, this court could not dismiss this complaint. The court is under a duty to examine the complaint to determine if the allegations provide for relief under any possible theory; the complaint should not be dismissed even if plaintiff cites a theory or a purported violation of a constitutional right which cannot stand scrutiny, so long as the factual allegations will support a claim for relief under another theory. 5 Wright & Miller, Federal Practice and Procedure:

Civil Section 1357 at 602; United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963). Since plaintiff has set forth some facts which would support his claims of constitutional violations, defendant's motion to dismiss is denied insofar as it is based on plaintiff's failure to identify the constitutional rights allegedly violated.

(2) Lack of Harm to the Plaintiff

For purposes of the motion to dismiss only, defendant Procunier states that, even if it can be assumed that he adopted a policy whereby all consecutive sentences were to be considered as one continuous term, this policy caused no harm to the plaintiff and, consequently, the complaint fails to state a claim on which relief can be granted.

In effect, the continuous sentence policy provided that "no one of the prison-

er's consecutive sentences may be deemed satisfied until the whole of such aggregate term has been served." 19 Ops. Cal. Att'y Gen. 23, 28 (1952). Plaintiff asserts in his complaint that this

> policy prohibited the issuance of a discharge for a completed term of imprisonment until such a time when all other commitments were completed. This policy had and was continuing to deny plaintiff discharges from "A", "B" and "C" terms, and by further allowing said terms of imprisonment to exceed the maximum terms as fixed by law or refixed by defendant [Adult Authority members].

It appears indisputable that the continuous sentence policy had the effect of denying plaintiff a discharge on terms of imprisonment for which he had served the maximum. The California Supreme Court stated:

> Although its records reflect no discharge from the "A" and "B" terms, but instead indicate service of more that 23 years on the 14-year maximum "A" terms [sic] and 18 years on the 5-year

> maximum "B" term, before this court respondent concedes that the maximum duration of the "A" and "B" terms was approximately April 1963 and May 1961, respectively. The Department of Corrections and the Adult Authority should, therefore, correct their records accordingly to reflect petitioner's discharge from the "A" and "B" terms.

In re Haygood, supra, at 806. The California Supreme Court ruled that plaintiff was entitled to be discharged on both the "C" and "D" terms because plaintiff had served the 10 years which the Adult Authority fixed as the term on the "C" term and because the "D" term could only be consecutive to the "A" and "B" terms under the sentence imposed.

Plaintiff's injury is that he was held in prison after the expiration of his terms. This injury resulted, not from the operation of the continuous sentence policy, but from the Adult Authority's error in treating the

"D" term as consecutive to the "C" term, when in fact it was consecutive only to th "A" and "B" terms.[1/] Thus, the continuous sentence policy was not the cause of plaintiff's injury, to the extent that his injury is limited to the time spent in prison after he should have been released.

Plaintiff, however, does not limit his allegations of injury merely to the imprisonment after the expiration of his terms. The complaint appears to allege injuries deriving from the fact that discharges were not entered on the "A" and "B" terms when he had served the maximum sentence; plaintiff assets mental distress,

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1/ The "D" term was consecutive only to the "A" and "B" terms because the sentencing judge ruled that the "D" term would commence at the time plaintiff would otherwise be released, that is the time at which he completed serving the sentences on which he was in prison at the time of his escape.

emotion and physical distress, damage to his reputation and his employment and economic opportunities, and cruel and unusual punishment. It may be that the anxiety arising from the failure to enter form discharges could amount to cruel and unusual punishment; plaintiff may have feared that the "A" and "B" terms were to be kept alive and that he might be held in prison on one or both of those terms after the expiration of his "C" and "D" terms. If so, plaintiff has stated a claim for relief under section 1983. In any event, defendant Procunier has failed to meet his burden in showing that he is entitled to dismissal on the ground that plaintiff has suffered no harm.

(3) Constitutionality of the Continuous Sentence Policy

Defendant Procunier makes two arguments that the continuous sentence policy was con-

stitutional and, consequently, that plaintiff has failed to otate a claim on which relief can be granted under section 1983. Defendant argues first that the policy did not discriminate against the plaintiff because it was applied to all prisoners. Second, defendant states that plaintiff had no right to notice and opportunity to object either to the adoption of the policy or to its application in his case and so that there was no constitutional defect in the adoption and application of the policy.

APPENDIX B

A P P E N D I X B-1

Testimony of Jean Briscoe

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RT. Vol. III, p. 528, lines 16-18:

Q: With regard to Mr. Haygood's sentences, did the continuous term policy apply to his case?

A: It did.

RT. Vol. III, p. 547, lines 1-3:

Q: Now you stated that continuous term policy applied to Mr. Haygood's case; is that correct?

A: That's correct.

RT. Vol. III, p. 565, lines 4-8:

A: Under the continuous term policy with the term subject to fixed and refixed by the Adult Authority when he was returned as a violator, his term was refixed at maximum on the "C" term and, therefore, it would record as having no time done on the "D" term.

RT. Vol. III, p. 546, lines 1-6:

A: In re: Haygood was a California Supreme Court opinion and it therefore became case law. The Department of Corrections headquarters office published the interpretations of that opinion, and we went through every file at Folsom Prison, as they did throughout the State, to review -- to see that provisions of Haygood were complied with in all cases.

A P P E N D I X B-2

Testimony of Harold C. Cranke

RT. Vol. III, p. 592, lines 7-13:

Q: The Attorney General's opinions to which you cited to Mr. Haygood, did they deal with the coninuous term policy?

A: They did.

Q: And you included those because -- or based on your belief that the continuous term policy applied to Mr. Haygood's case?

A: That's right.

RT. Vol. III, p. 601, lines 12-25:

Q: Didn't Mr. Haygoood in his letter tell you that they reached that time?

A: They hadn't reached that time.

Q: Didn't he tell you that he was serving more time on those terms than was possible?

A: They were all tied together by his consecutive term and none of them could actually be discharged until he had served out his "D" term.

Q: Why wasn't he discharged on all three -- "A", "B", and "C" terms?

A: Because they were tied to the "D" term.

Q: You've read 4531, isn't it consistent that they would be discharged?

A: No, sir.

A P P E N D I X B-3

Testimony of Benjamin Seymour

RT. Vol. III, p. 615, lines 2-6:

Q: Did you feel after reviewing the material that you looked at and after looking at Mr. Haygood's letter, that the continuous term policy had any application of Mr. Haygood's case?

A: I felt it did.

RT. III, p. 630, lines 6-8:

Q: BY MR. JACOBSON: My question is, why wasn't Frank's "A", "B", "C" terms discharged?

A: Because of the continuous term policy.

A P P E N D I X B-4

Judge Karlton

Do you have any further, Mr. Prahl?

MR. PRAHL: We do, your Honor.

THE COURT: You may set them out.

MR. PRAHL: With regard to the instruction offered by defendants regarding the continuous term policy, the Court had added a line reading, "Under this policy plaintiff's 'D' term was consecutive to his 'A' and 'B' terms, but not to his 'C' term." The Court has added that after line 12 of our proposed instruction.

The Court has stricken, "The plaintiff is this case was not injured by the application of the continuous term policy to his sentence."

THE COURT: This is correct.

MR. PRAHL: I believe we added to that, "To his sentence he did." And it should have been, "To his sentences." It is the defendants' contention that the prior ruling

by Judge McBride wherein this matteer that the application of the continuous term policy to plaintiff's case did not harm him: that the thing that harmed plaintiff in this case was the miscalculation in his term, and that this is now a matter of law and the jury is entitled to be apprised of this fact that in fact it was -- the question before them is not whether the application of the continuous term policy harmed him, but whether defendants are liable because they failed to discover that the "D" term had been erroneously determined to run consecutive to the "C" term. And by failing to instruct the jury that it was not the continuous term policy which harmed plaintiff, the jury will go into the jury room under the misapprehension that they can award damages, or the defendants may be liable on the application of the continuous term policy.

THE COURT: The Court is satisfied that the instruction as presented is misleading. We all agree, I think, that the issue is whether or not the continuous term policy was misapplied in this case. It is insufficient to say that the application of the continuous term policy, as an abstract matter, which is, of course, as I understand Judge McBride to have found, and quite properly in my view, did not harm the defendants. It is quite another thing to say as to the facts of this case under these circumstances the application did not harm, because it is plaintiff's theory of the case that it is the misapplication of the policy because it was made to run to a term occurring subsequent to the escape which resulted in the holding.

The objection is accordingly overruled. Next?

A P P E N D I X B-5

Jury Instruction

RT. Vol. III, p. 698, lines 5-14:

Under the laws of the State of California, a person who has received a prison sentence is regarded as serving one continuous term of imprisonment and under the laws of the State of California none of the terms terminate until the prisoner has served the last of the terms. This is known as the continuous term policy and plaintiff was subject to the continuous term policy. Under this policy plaintiff's "D" term was consecutive to his "A" and "B" term but not his "C" term.